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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

JOSEPH TAYLOR, EDWARD MLAKAR,
MICK CLEARY, and EUGENE ALVIS,
individually and on behalf of all others
similarly situated,

Plaintiffs,
v.
GOOGLE LLC,
Defendant.

Case No. 5:20-cv-07956-VKD

**GOOGLE LLC'S REPLY IN SUPPORT OF
MOTION TO DISMISS PLAINTIFFS'
COMPLAINT**

Date: April 20, 2021
Time: 10:00 a.m.
Judge: Hon. Virginia K. DeMarchi

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1 **I. INTRODUCTION**

2 Plaintiffs' Opposition ("Opp.") tries to obscure the defects of the Complaint through
 3 sensationalized rhetoric, likening Google to a "thief" and making other dramatic accusations. But
 4 what this case really involves are simply the data transmissions to and from mobile devices that
 5 enable consumers to use their devices in a normal and secure way. The fact that such data
 6 transmissions can occur over *cellular* networks should come as no surprise to users of *cellular*
 7 phones. While a full discussion of the security enhancements and other benefits these data
 8 transmissions enable is beyond the scope of this motion, it is notable that Plaintiffs all apparently
 9 continue to use their Android devices despite their allegations. (Compl. ¶¶ 8-11.) For all its
 10 hyperbole, Plaintiffs' Opposition offers no valid justification for the many defects of the Complaint,
 11 which should be dismissed as a matter of law.

12 First, Plaintiffs turn Article III standing doctrine on its head in an attempt to justify their
 13 inability to allege any concrete injury. Specifically, Plaintiffs urge this Court to adopt a novel rule
 14 that merely alleging a violation of a common law interest suffices to confer standing, without more.
 15 That is not the law, and Plaintiffs cannot escape the need to allege a concrete injury.

16 Second, Plaintiffs still have not pointed to any personal property that could be the subject
 17 of conversion. The Opposition claims Plaintiffs' cellular contracts give them ownership over
 18 "bytes of cellular data." But this contradicts the allegations of the Complaint, which concedes these
 19 contracts create only a right to a *service*—the transmission of information over a cellular network
 20 up to a designated "data allowance." (Compl. ¶ 24.) This contractual right to receive cellular
 21 services is not a recognized form of property, and Plaintiffs offer no meaningful rebuttal to the case
 22 law rejecting similar efforts to shoehorn contractual claims into the conversion doctrine.

23 Third, Plaintiffs try to obscure their failure to plead the required elements of substantial
 24 interference and resulting damages by raising various straw man arguments and constructing novel
 25 principles inconsistent with prevailing law. Contrary to Plaintiffs' assertions, merely declaring that
 26 a conversion occurred does not suffice to show a substantial interference with property. Nor are
 27 Plaintiffs entitled to a presumption of resulting damages.

28 Fourth, Plaintiffs cannot avoid the consent they gave Google regarding the data transfers

1 they now challenge. Plaintiffs assert the Google Terms and Policies they agreed to apply only to
 2 data transfers that occur when a user is “actively” using an Android device and the device is
 3 connected to Wi-Fi. But the Terms and Policies contain no such limitations and for good reason,
 4 as any such limitations would inhibit the normal functioning of mobile devices.

5 Finally, Plaintiffs cannot maintain a common count for quantum meruit separate and apart
 6 from their conversion claim. And even if Plaintiffs could have a standalone quantum meruit claim,
 7 they failed to allege facts satisfying the elements of any such claim.

8 For all these reasons, Google’s Motion should be granted in its entirety.¹

9 **II. ARGUMENT**

10 **A. Plaintiffs Lack Article III Standing.**

11 Because Plaintiffs cannot allege any concrete injury, they urge the Court to find that they
 12 have Article III standing simply because they have brought a conversion claim and seek recovery
 13 under a quantum meruit theory, relying on *In re Facebook Inc. Internet Tracking*, 956 F.3d 589
 14 (9th Cir. 2020). (See Opp. at 13-14.) As Plaintiffs would have it, *Facebook Internet Tracking*
 15 establishes a sweeping rule that any alleged violation of a common law interest establishes standing,
 16 even with no concrete injury. (See Opp. at 13-14.) That interpretation contradicts longstanding
 17 precedent, misreads the Ninth Circuit’s decision, and should be rejected.

18 The Supreme Court has made clear that Article III requires a plaintiff to demonstrate an
 19 “injury in fact,” *i.e.*, that they “suffered an invasion of a legally protected interest that is **concrete**
 20 and **particularized** and **actual or imminent, not conjectural or hypothetical.**” *Spokeo, Inc. v.*
 21 *Robins*, 136 S. Ct. 1540, 1547-48 (2016) (emphasis added and internal quotations omitted). Thus,
 22 not all invasions of a “legally protected interest” can constitute an “injury in fact.” The Supreme
 23 Court recently reaffirmed that principle in *Thole v. U.S. Bank N.A.* where participants in a
 24 retirement plan brought an ERISA claim against the plan’s administrators. 140 S. Ct. 1615, 1618

25 ¹ Plaintiffs request that this Court take judicial notice of the state court’s decision in *Csupo v.*
 26 *Google*. (See ECF No. 39-2 at 2-3.) But courts regularly apply Rule 8.1115(a) to find that
 27 unpublished decisions from a California Superior Court are not even *citable*. See *Ironshore*
Specialty Ins. Co. v. 23andMe, Inc., No. 14-cv-03286-BLF, 2016 WL 3951660, at *4 (N.D. Cal.
 July 22, 2016); *see also Aixtron, Inc. v. Veeco Instruments Inc.*, 52 Cal. App. 5th 360, 399 (2020).
 28 In any event, it is well settled that “a written trial court ruling has no precedential value.” *Bolanos*
v. Super. Ct., 169 Cal. App. 4th 744, 761 (2008).

(2020). The plaintiffs argued defendants violated their duties of loyalty and prudence by mismanaging the plan. *Id.* at 1619. The Court found plaintiffs lacked standing because they “received all of their monthly benefit payments” and “ha[d] not sustained any monetary injury” notwithstanding defendants’ alleged violations. *Id.* at 1618-19. In other words, the alleged violations of legal interests protected by the duties of loyalty and prudence did not establish standing because there was no resulting injury. *Id.* at 1619; *see also Pierce v. Ducey*, 965 F.3d 1085, 1089 (9th Cir. 2020) (finding no Article III standing and explaining that a “concrete” injury “must actually exist” and “an abstract, theoretical concern will not do”) (citation and quotation omitted). Plaintiffs’ interpretation of *Facebook Internet Tracking* ignores this recent precedent and should be rejected for that reason alone.

But even further, Plaintiffs misread *Facebook Internet Tracking* itself. While that case held that “state law **can** create interests that **support** standing in federal courts,” it did not announce a blanket rule that **any** theoretical violation of a common law interest **suffices** to confer standing. 956 F.3d at 599. Indeed, such a principle would run afoul of countless decisions that look to whether a plaintiff asserting common-law claims suffered a concrete injury apart from the alleged violation of their common-law interest. *See, e.g., Daniel v. Nat'l Park Serv.*, 891 F.3d 762, 767 (9th Cir. 2018) (“[A] plaintiff may not rely on bare legal conclusions to assert injury-in-fact, or engage in an ingenious academic exercise in the conceivable to explain how defendants' actions caused his injury.”) (internal quotations omitted); *Opperman v. Path*, 84 F. Supp. 3d 962, 990 (N.D. Cal. 2015) (concluding plaintiffs were not entitled to a presumption of injury based on allegations of conversion and dismissing claim for lack of standing). Plaintiffs’ suggestion that *Facebook Internet Tracking* silently abrogated this longstanding precedent, *see* Opp. at 13, n.2, and enshrined a rule that any abstract invasion of a common law interest confers standing, Opp. at 12-14, is meritless.

Without such a rule, Plaintiffs have no standing to pursue their conversion claim. Plaintiffs argue it suffices to allege that Google “invaded” a “concrete property interest in the bytes they purchased.” (Opp. at 12-13.) But simply proclaiming that Plaintiffs have a “concrete property interest” does not demonstrate that Plaintiffs suffered a concrete *injury*. Without allegations that

1 Google's conduct impacted Plaintiffs' use of their cellular data plans or forced them to pay overage
 2 charges or led to some other concrete injury—allegations Plaintiffs appear intent on avoiding—
 3 their conversion claim fails for lack of Article III standing. *See Thole*, 140 S. Ct. at 1618-19;
 4 *Opperman*, 84 F. Supp. 3d at 990 (plaintiffs were not entitled to a presumption of injury-in-fact
 5 based on allegations of conversion); *see also Yunker v. Pandora Media, Inc.*, No. 11-cv-03113
 6 JSW, 2013 WL 1282980, at *5 (N.D. Cal. Mar. 26, 2013) (concluding plaintiff did not have
 7 standing based on alleged abstract interference with his interest in his device's memory space where
 8 he did not allege associated impact on his use and enjoyment of device).²

9 Further, Plaintiffs' alleged interest in “disgorging Google's unjust enrichment” cannot
 10 support their conversion claim. (Opp. at 13-14.) By Plaintiffs' admission, they do not seek
 11 “disgorgement” as a remedy for their conversion claim—in fact, according to them, that is what
 12 distinguishes their conversion and quantum meruit claims. (*Id.* at 27-28 (arguing their quantum
 13 meruit claim “seeks to recover the value of the benefit Google derived from these passive transfers
 14 that occurred at Plaintiff's expense” and “contrasts with the conversion claim, which focuses on
 15 Plaintiffs' property interest and the market value of cellular data”)); *cf. also* Cal. Civ. Code § 3336
 16 (setting forth presumptive remedies for conversion without identifying disgorgement). Because “a
 17 plaintiff must demonstrate standing for each claim he seeks to press,” any alleged interest in
 18 recovering unjust enrichment cannot create standing for Plaintiffs' separate conversion claim.
 19 *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008).

20 Finally, Plaintiffs' alleged interest in “disgorging Google's unjust enrichment” cannot
 21 create standing for any claim because the Complaint does not seek this remedy, notwithstanding
 22 Plaintiffs' characterization in their Opposition. While *Facebook Internet Tracking* concluded an
 23

24 ² Plaintiffs' attempts at distinguishing these cases, *see* Opp. at 13, n.2, fall flat. First, Plaintiffs try
 25 to distinguish *Opperman* by arguing that there, the defendant did not “take[] the only copy of [the
 26 information at issue] and deprive plaintiffs of its use.” (*Id.* (citing *Opperman*, 87 F. Supp. at 1032).)
 27 But Plaintiffs also do not allege anything of the sort in this case, as they do not contend that
 28 Google's alleged use of the cellular data plans prevented them from enjoying those plans. Second,
 Plaintiffs argue that *Yunker* dismissed the trespass and conversion claims for failure to state a claim.
 (*Id.* (citing *Yunker*, 2013 WL 1282980, at *15-17).) While that is true, that case *also* rejected the
 argument that abstract interference with a property interest is sufficient to confer standing. *Yunker*,
 2013 WL 1282980, at *5 (concluding allegations of diminished memory space were insufficient to
 confer standing where plaintiff did not allege associated performance problems).

1 interest in disgorging unjustly earned profits supports standing in some circumstances, the plaintiffs
 2 there specifically alleged the nature of the profits at issue and their entitlement to them. *See* 956
 3 F.3d at 600-01. In contrast, Plaintiffs here do not seek disgorgement of profits as a remedy on any
 4 claim and refer only to recovering the “value” of the property with which Google allegedly
 5 interfered. (*See* Compl. ¶¶ 74-75, 78.)

6 **B. Plaintiffs Have Not Stated a Claim for Conversion.**

7 **1. Plaintiffs fail to identify cognizable property.**

8 **a. Plaintiffs’ contractual rights to receive cellular service are not
 9 property.**

10 To create the impression that this case involves property, Plaintiffs repeatedly claim that
 11 their cellular data plans give them ownership of “bytes of cellular data.” (*See, e.g.*, Opp. at 14
 12 (stating in heading that “purchased bytes of cellular data are property”)). But that assertion
 13 mischaracterizes the contractual rights at issue by conflating distinct concepts: (1) the **means** of
 14 transmitting information between mobile devices and remote servers via a cellular network, (2) the
 15 **amount** of information that is transmitted, which can be measured in bytes; and (3) the **underlying
 16 information** itself that is transmitted (*e.g.*, text messages, security updates, or other data files).³

17 Here, Plaintiffs’ conversion claim is not based on alleged ownership in the information their
 18 devices exchange with Google—*e.g.*, the crash reports, software patches, and other data files
 19 exchanged via “passive” transfers. Nor do Plaintiffs own “bytes” themselves, as they sometimes
 20 seem to claim. (*See, e.g.*, Opp. at 19 (“The property that Google converts are the individual bytes
 21 that Google uses to execute passive transfers.”).) A byte is just a unit of measurement, and you can
 22 no more own a “byte” than you can an hour or an inch.

23 Rather, Plaintiffs’ claim is premised on alleged “property interests in the cellular data
 24 *allowances* that they purchase from their mobile carriers.” (Compl. ¶ 63 (emphasis added).) So
 25 when Plaintiffs say they own “bytes of cellular data,” what they really mean is that they have a
 26 contractual right—the right to transmit information over a cellular network up to a certain

27 ³ *See* Encyclopedia Britannica, Byte, (“[T]he basic unit of information in computer storage and
 28 processing. A byte consists of 8 adjacent binary digits (bits), each of which consists of a 0 or 1.”)
 (available at: <https://www.britannica.com/technology/byte>).

allowance—that is *measured in* “bytes of cellular data.” Plaintiffs acknowledge as much in other parts of their Opposition and in the Complaint. (See Opp. at 10 (“Plaintiffs were granted the right to send and receive digitized information over [a] carriers’ cellular network.”); Compl. ¶ 24 (alleging that Plaintiffs’ plans allow them “to access the carriers’ cellular data networks, thereby providing users with the ability to send and receive information over the internet without a Wi-Fi connection.”).) These sort of contractual rights are not any recognized form of *property*, even if the rights are exclusive⁴ and measurable, because they are a right to use a *service*. (See Mot. at 10-11 (citing cases explaining that such a contractual right to receive a service cannot be converted).) Plaintiffs attempt to argue these cases do not stand for that proposition (Opp. at 19-20), but the cases are unambiguous. *See, e.g., Monster Energy Co. v. Vital Pharms., Inc.*, No. EDCV 18-1882 JGB (SHKx), 2019 WL 2619666, at *13 (C.D. Cal. May 20, 2019) (reaching “the common sense conclusion which is also supported by ample precedent: that the benefits of contractual rights are not personal property capable of conversion”).

To deflect from this problem, the Opposition baldly asserts that Plaintiffs have a “possessory interest in cellular data that exists independent of the contracts.” (Opp. at 9.) But Plaintiffs’ reference to “cellular data” again conflates concepts. While it is true that the underlying data that is transmitted might exist independently of the contracts, as discussed above, this case is not about that information. The only interest Plaintiffs have, by their own characterization, is in their “cellular data *allowances*.” (Compl. ¶ 63 (emphasis added).) These allowances would cease to exist if Plaintiffs cancel their cellular plans because they exist solely by virtue of these contracts.

That the “bytes of cellular data” Plaintiffs reference are just a measure of a service, and not property on their own, is highlighted by Plaintiffs’ unlimited plans. Plaintiffs offer no coherent explanation for how they could own, possess, or control infinite bytes or how such a property interest could be precisely defined and delineated. And if Plaintiffs cannot own the infinite bytes

⁴ Plaintiffs do not allege exclusive control even of this contractual right to service, as they do not allege that they alone have the right to draw from their data allowances. (Mot. at 12-13 (noting the ubiquity of family and corporate data plans).) The Opposition dodges this issue by saying that the capacity to share property is consistent with ownership. (Opp. at 18.) But the issue here is not whether Plaintiffs chose to share their allowances with others—instead, Plaintiffs may never have had exclusive control at all, as a family or corporate plan allows all users to draw from the same data allowance.

1 they are entitled to under their unlimited plans, their theory of property collapses, as all that remains
 2 is an unrestricted contractual right to a service.⁵

3 Plaintiffs' analogy to a requirements contract for an apple seller only exposes this
 4 incoherence further. (Opp. at 16.) In that example, the apples exist independent of the contract
 5 and the fact that the contract allows the seller to take possession of an indefinite number does not
 6 detract from the fundamental nature of apples, which can be possessed and controlled as property.
 7 Here, the purported property interest consists *solely* of the contractual right to use a service and, in
 8 the context of an unlimited plan, to do so without restriction. This contractual arrangement does
 9 not give rights to any underlying property that Plaintiffs can possess like an apple, has no precisely
 10 defined boundaries, and lacks the necessary hallmarks of property. (See Mot. at 11-12.)

11 **b. Plaintiffs' analogies to other forms of property fail.**

12 Plaintiffs' analogies to other forms of property also fail. To start, Plaintiffs make much of
 13 the fact that California courts have recognized certain "intangible" property in the conversion
 14 context. But these interests fundamentally differ from the bytes at issue here. (Opp. at 15.) Take
 15 for example the alleged theft of television programming: In *DIRECTV, Inc. v. Pahnke*, the plaintiff
 16 alleged that the programming itself—intellectual property that existed independent of the contract
 17 that governed its distribution—was converted, leading to quantifiable harm. 405 F. Supp. 2d 1182,
 18 1189 (E.D. Cal. 2005). The regulatory approval for an airplane design in *G.S. Rasmussen &*
 19 *Assocs., Inc. v. Kalitta Flying Serv., Inc.*, is similar: There, the FAA granted the plaintiff a license
 20 to implement a certain airplane design, a kind of quasi-intellectual property that could be further
 21 licensed to third-parties. 958 F.2d 896, 906 (9th Cir. 1992). The Ninth Circuit found this
 22 transferrable design approval was property, but nowhere held that a contractual right to receive a
 23 service, what is at issue here, would be. *Id.* The credit card information in *Welco Elecs., Inc. v.*
 24 *Mora* is more of the same. 223 Cal. App. 4th 202, 211 (2014). The theft of credit card information
 25 in that case had the same effect as the direct theft of money, which has long been recognized as a

26
 27 ⁵ Plaintiffs assert that "[n]o one is suggesting that purchasers of 'unlimited' data plans have a right
 28 to an infinite amount of cellular data." (Opp. at 16.) But then what are Plaintiffs suggesting? If
 Plaintiffs are not claiming a property interest in their data allowances—which are unlimited—then
 it is unclear what the alleged property is.

1 form of convertible property. Plaintiffs muster no case finding that a contractual right to a service
 2 is property that can be converted—instead, the case law holds just the opposite. (Mot. at 10-11.)

3 Plaintiffs' attempt to analogize to utilities like gas and water also fails. Plaintiffs say that
 4 when information is transmitted to or from their devices, “users consume discrete bytes of cellular
 5 data” similar to the way people consume gas, water, and other utilities. (Opp. at 20.) But that relies
 6 on the same mischaracterizations discussed above. Again, “cellular data” is the *means* by which
 7 underlying information is transmitted, and “bytes of cellular data” are just a *measure* of how much
 8 of that service is used. Unlike in the utility context, Plaintiffs here did not pay for some underlying
 9 commodity like gas or water that they could receive and consume; they paid for the right to utilize
 10 their carriers’ cellular networks up to certain contractually defined “allowances.” (Compl.
 11 ¶ 63.) And unlike the diversion of gas or water, which deprives the intended recipient of the use of
 12 those commodities and can result in increased utility charges, the allegations here do not involve
 13 any such impact and do not support extending the notion of “property” in the entirely novel way
 14 that Plaintiffs propose.

15 All of these analogies only drive home the point: Cellular data plans are contracts that allow
 16 users to access a service, but they do not assign interests in independently existing property. And
 17 the instruction of California courts has been clear: This kind of expansion of conversion into other
 18 domains should be checked, not endorsed. (See Mot. at 9-10, 19.)

19 **2. Plaintiffs allege no substantial interference with their data allowances.**

20 Plaintiffs do not dispute that conversion requires “actual interference with [a party’s]
 21 ownership or right of possession,” *Moore v. Regents of the Univ. of Cal.*, 51 Cal. 3d 120, 136
 22 (1990), which must be “substantial” and cannot be based on mere “use” or “intermeddling” with
 23 property, *Jordan v. Talbot*, 55 Cal. 2d 597, 610 (1961). (See Opp. at 21.) Nor do Plaintiffs contend
 24 that Google in any way interfered with their ability to use their cellular data plans. (See Mot. at
 25 14.) Because they have no answer to these dispositive points, Plaintiffs resort to sensationalized
 26 rhetoric, accusing Google of seeking a “license to steal,” among other dramatic claims. These
 27 efforts to obscure the defects of their conversion theory all fail.

28 First, Plaintiffs argue they need not allege that Google took “*all* of Plaintiffs’ data.” (Opp.

1 at 21 (emphasis in original).) But that is not what Google argues. Google does not quarrel with
 2 the notion that a conversion claim can potentially lie where a defendant takes property from “a
 3 divisible pool of resources” without taking “all” of the available property. (*Id.*) But the purported
 4 “property” here is not a portion of some “pool” of “bytes” but rather Plaintiffs’ contractual right to
 5 transmit data over a cellular network. Plaintiffs’ claim fails—not because they must allege Google
 6 used up “all” of their data allowances—but because they do not allege *any* interference at all with
 7 their ability to use their data plans, even as a result of the partial use of their data allowances.

8 Second, Plaintiffs claim Google is improperly insisting on allegations of “consequential
 9 harms . . . in addition to the direct harm of being deprived of property they purchased.” (Opp. at
 10 21.) But again, “the property they purchased” (if it is property at all) were rights to send and receive
 11 data over a cellular network, so the question is whether Google substantially interfered with those
 12 rights. Again, Plaintiffs allege no interference with this right, let alone any substantial interference.

13 Third, Plaintiffs argue the Complaint “squarely meets [the] requirement” of substantial
 14 interference by alleging a “conversion of a definite, measurable number of bytes.” (Opp. at 21.)
 15 But that argument begs the question of what constitutes the alleged interference. Plaintiffs carefully
 16 avoid specifying as much because, at bottom, they are alleging only that Google used a portion of
 17 their data allowances, without pointing to how that interfered with their ability to use the allowances
 18 themselves, which is insufficient to demonstrate substantial interference. *See Jordan*, 55 Cal. 2d
 19 at 610 (mere “use” or “intermeddling” are not sufficient to sustain a conversion claim).

20 Fourth, Plaintiffs’ cited cases do not support any finding of substantial interference and
 21 instead reinforce, by contrast, the defects of the Complaint. (Opp. at 21-22.) In those cases, the
 22 plaintiffs alleged defendants dispossessed them of their property or otherwise deprived them of the
 23 rights inherent to property ownership, like the ability to license the use of their property. *See G.S.*
 24 *Rasmussen*, 958 F.2d at 906 (plaintiff offered to license its FAA permit to the defendant for \$95,000
 25 but defendant photocopied and used it without permission); *Welco Elecs.*, 223 Cal. App. 4th at 211
 26 (defendant “misappropriated plaintiff’s credit card and used it” to “obtain[] the money from the
 27 credit card company,” causing plaintiff to “become indebted to the credit card company”); *Shein*
 28 *v. Canon U.S.A., Inc.*, No. CV 08-07323 CAS (Ex), 2009 WL 1774287, at *13 (C.D. Cal. June 22,

1 2009) (defendant prevented plaintiff from using remaining ink in cartridges plaintiff had
 2 purchased). Here, by contrast, Plaintiffs do not allege Google prevented them from exercising *any*
 3 of their contractual rights under their cellular data plans in any way.⁶

4 **3. Plaintiffs have not established damages.**

5 Plaintiffs do not dispute (nor could they) the black letter law that conversion requires not
 6 only substantial interference with a property interest, but “resulting damages.” *Fremont Indem.*
 7 *Co. v. Fremont Gen. Corp.*, 148 Cal. App. 4th 97, 119 (2007). Instead, Plaintiffs try to sidestep
 8 this requirement by claiming they need only allege that the passive data transfers at issue used some
 9 portion of their cellular data allowance, at which point damages are presumed under Civil Code
 10 Section 3336. (Opp. at 21-24.) That is not and cannot be the law.

11 Contrary to Plaintiffs’ arguments, Section 3336 does not entitle Plaintiffs to a “presumption
 12 of detriment.” (Opp. at 22-23.) Importantly, Section 3336 must be read in conjunction with Section
 13 3333, which establishes a measure of damages for most tort cases: “For the breach of an obligation
 14 not arising from contract, the *measure of damages, except where otherwise expressly provided by*
 15 *this Code*, is the amount which will compensate *for all the detriment proximately caused* thereby,
 16 whether it could have been anticipated or not.” Cal. Civ. Code § 3333 (emphasis added). As
 17 contemplated by Section 3333, Section 3336 provides for an alternative measure of damages for
 18 conversion claims that is based on the value of the converted property. But Section 3336 does not
 19 purport to create a presumption that any plaintiff who alleges interference with a property interest
 20 is entitled to damages; it merely clarifies the “measure of damages” available to a plaintiff who can
 21 show some proximately caused “detriment.”

22 *Lueter v. State of California*, 94 Cal. App. 4th 1285 (2002), on which Plaintiffs rely, (Opp.
 23 at 23), confirms this reading of Section 3336. In that case, the court considered a conversion claim

24 ⁶ Plaintiffs suggest that *Supply Pro Sorbents, LLC v. RingCentral, Inc.*, No. 16-cv-02113-JSW,
 25 2017 WL 4685705, at *1 (N.D. Cal. July 17, 2017), would apply only if Plaintiffs alleged Google
 26 converted their Android devices. (Opp. at 12, n.11.) But Plaintiffs cannot have their cake and eat
 27 it too. By Plaintiffs own logic, intangible property is covered by California conversion law. (See
 28 Opp. at 14.) And Plaintiffs offer no reason to believe that established principles regarding
 substantial interference would not apply here to their purported interest in their data plans, if such
 plans are property. See *Supply Pro Sorbents*, 2017 WL 4685705, at *5 (“[T]here may be minor and
 unimportant dispossessions which do not seriously interfere with the other’s right of control, and
 so do not amount to a conversion.”).

1 and reaffirmed that “[a]ctions for the taking and damaging of private property are in the field of
 2 tortious action, and hence are subject to the rule that ***proof of damage is an essential part of the***
 3 ***plaintiff’s case.***” *Id.* at 1302 (emphasis added). As the *Lueter* court further explained, to
 4 demonstrate the damages element of conversion, the plaintiff must show both: (1) “***proximately***
 5 ***caused injury,***” *i.e.*, “the fact of harm suffered by the plaintiff due to the defendant’s conduct,” to
 6 a reasonable certainty; and (2) the “***measure of damages,***” *i.e.*, “the monetary sum that the plaintiff
 7 may be awarded as compensation for the injury,” to a “degree of certainty that the circumstances
 8 of the case permit.” *Id.* at 1303 (emphasis added).

9 Similarly, the court in *English & Sons, Inc. v. Straw Hat Restaurants, Inc.* rejected an
 10 argument that Section 3336 creates a presumption of damages. 176 F. Supp. 3d 904 at 924 (N.D.
 11 Cal. 2016). Relying on *Lueter*, the *English & Sons* court concluded the conversion doctrine
 12 imposes a “requirement of actual proof” of damages. *Id.* The court thus rejected the movant’s
 13 summary judgment motion because it had failed to present evidence of damages.⁷ *Id.* As both
 14 *Lueter* and *English & Sons* show, Plaintiffs’ contention that Section 3336 permits courts to
 15 “presume” damages is wrong.

16 Plaintiffs’ remaining arguments fare no better. First, Plaintiffs assert that Google has not
 17 cited a case where a court dismissed a conversion claim for failure to allege damages, but they
 18 ignore the many cases cited by Google holding that damages are a necessary element of a
 19 conversion claim. (See Mot. at 15 & 16 n.2.) For example, Plaintiffs do not even acknowledge
 20 *English & Sons*, 176 F. Supp. 3d at 904. (See Mot. at 16 n.2.)

21 Second, Plaintiffs complain that Google is insisting on allegations of “consequential
 22 damages [a]s a prerequisite to any recovery.” (Opp. at 23.) But that argument is a straw man.
 23 Google is not contending that “consequential” damages must always be shown to state a conversion
 24 claim. Rather, Google is arguing that Plaintiffs must show ***some*** form of damages contemplated
 25 by Section 3336 and that damages cannot simply be presumed as a matter of law without erasing
 26

27 ⁷ *English & Sons* was in a different procedural posture but the premise underlying the decision is
 28 equally applicable here—“actual damages” are an essential component of any conversion claim,
 and a failure to demonstrate damages defeats that claim. *English & Sons*, 176 F. Supp. 3d at 924.

1 damages as an element of the claim.⁸ Because Plaintiffs have failed to allege any damages, and do
 2 not even pretend to do so, their claim must be dismissed.⁹

3 **4. Plaintiffs consented to the alleged data transfers.**

4 With regard to consent, the Opposition is most notable for what it does not say. At no point
 5 do Plaintiffs identify any type of “passive” data transmission that is not covered by Google’s Terms
 6 and Policies, which go to great lengths to explain the ways that Android devices can share data with
 7 Google. (See Mot. at 4-5, 16-19; Spector Decl. (ECF 33) Exs. A-D.) Instead of challenging whether
 8 Google could exchange data with their devices, Plaintiffs challenge only *when* Google could do so.

9 First, Plaintiffs invent the arbitrary rule that the only time an Android device can
 10 communicate with a Google server is when the user is actively interacting with the device. (Opp.
 11 at 24-26.) But this rule has no basis in the relevant contract language. Take the following
 12 provisions from the Google Privacy Policy as an example:

13 The information we collect includes unique identifiers, browser type and settings,
 14 device type and settings, operating system, mobile network information including
 15 carrier name and phone number, and application version number. We also collect
 16 information about the interaction of your apps, browsers, and devices with our
 17 services, including IP address, crash reports, system activity, and the date, time,
 18 and referrer URL of your request.

19 ***We collect this information when a Google service on your device contacts our***
 20 ***servers*** — for example, when you install an app from the Play Store or when a
 21 service checks for ***automatic*** updates. If you’re using an Android device with
 22 Google apps, ***your device periodically*** contacts Google servers to provide
 23 information about your device and connection to our services. This information
 24 includes things like your device type, carrier name, crash reports, and which apps
 25 you’ve installed.

26

⁸ When attacking this straw man, Plaintiffs rely on *Lueter* for the proposition that parties need not
 27 prove consequential damages and can recover “the market value of their converted property, even
 28 when the property [is] essentially worthless.” (Opp. at 23.) But the plaintiff in *Lueter* demonstrated
 29 an injury entitling them to recover the fair market value of their property because the defendant
 30 threw away the plaintiff’s property. See 94 Cal. App. 4th at 72. Here, Plaintiffs do not allege they
 31 were deprived of even the *de minimis* value at issue in *Lueter*.

32 ⁹ Plaintiffs also spill much ink developing an argument that damages for conversion can be awarded
 33 even where the challenged behavior benefited the plaintiff. (Opp. at 23-24.) Those cases all rely
 34 on Section 3337 and thus the notion that the benefit was given “without [the plaintiff’s] consent.”
 35 See Cal. Civ. Code § 3337. For the reasons given below, Plaintiffs ***did*** consent to the use of their
 36 cellular data plans, *see* Section II.B.4 *infra*, and these cases are thus inapposite.

1 (Spector Decl., Ex. B at 3 (emphasis added).) This detailed disclosure makes clear that Android
 2 devices regularly send a wide range of information to Google servers, including highly technical
 3 information generated on an automated basis that has nothing to do with a user's active use of a
 4 device. Only a lawyer with an agenda would read this language as imposing a requirement that
 5 the user be "actively" interacting with the device at the time of any data transfer.

6 This "active use" concept is not only nowhere to be found in the Google Terms and Policies,
 7 imposing it would lead to absurdities. *See* Cal. Civ. Code § 1638 (instructing against interpretations
 8 of contracts that would lead to the "absurd"). To start, this reading of the Google Terms and
 9 Policies would mean a Google server could never send data to an Android device unless it already
 10 knew the device was in "active use." But this would create a Catch-22: Google would have no way
 11 of knowing whether the device was in active use unless data was sent to the server to let it know.
 12 Moreover, no longer could Google alert a user that she received an email, push an urgent software
 13 patch, or automatically update an app. And any communication a device needs to make with a
 14 Google server would have to be rushed into the window when the user is "actively using" the
 15 device, even if this was an inefficient use of device resources or otherwise against the user's
 16 interests.

17 The Opposition attempts to defend Plaintiffs' interpretation by arguing the language quoted
 18 above falls under a heading with the term "use" of Google services and therefore only refers to
 19 data transfers that take place during "active use" of the device (notably, Plaintiffs add the "active,"
 20 which appears nowhere in any of the relevant documents). This is a tortured reading of even the
 21 heading, but regardless, the title of a contract section cannot alter the meaning of a specific
 22 provision. *See Prouty v. Gores Tech. Grp.*, 121 Cal. App. 4th 1225, 1235 (2004) (specific
 23 provisions control over general provisions).¹⁰

24 Second, Plaintiffs argue that even if they consented to "passive" data transfers, Google was
 25 required to transmit such data only over Wi-Fi networks, and could not do so over cellular networks.
 26 But again, the Google Terms and Policies contain no such requirement, and the Opposition does

27
 28 ¹⁰ The Opposition attempts to inject this invented "active use" concept into various other provisions
 that likewise do not support it. (*Compare* Mot. at 19 with Opp. at 24-26.)

1 not even bother to argue otherwise. For example, the Google Terms and Policies explain that “your
 2 device periodically contacts Google servers to provide information about your device,” with no
 3 limitation on the type of network (Wi-Fi or cellular) that can be used to do so. (Spector Decl., Ex.
 4 B at 3.) Plaintiffs ask the Court to read into this provision a new term, as if the language read: “*if*
 5 *your device is connected to WiFi*, your device periodically contacts Google servers to provide
 6 information about your device.” (See Opp. at 25-26.) The Opposition offers no basis, in the
 7 contract language itself or from other authority, to do so.¹¹

8 Regardless, these competing contract interpretations, and arguments about how Google
 9 ought to have exercised its contractual authorization to communicate with Android devices, are the
 10 domain of contract law, *not* conversion. (See Mot. at 18-19.) To call this “theft” stretches the tort
 11 of conversion beyond recognition.¹²

12 **C. Plaintiffs’ Common Count for Quantum Meruit Fails.**

13 Plaintiffs’ contention that their common count for quantum meruit can proceed separate and
 14 apart from their conversion claim, (see Opp. at 28), is wrong. Plaintiffs rely on *Crocker-Anglo*
 15 *Nat’l Bank v. Kuchman*, but that case and its progeny say only that “[a] plaintiff may rely on a
 16 different theory of recovery in the common count *as long as* that theory [of recovery] *is fully*
 17 *supported in the specific facts pleaded in the other counts.*” 224 Cal. App. 2d 490, 497 (1964)
 18 (emphasis added). As explained in Google’s Motion, because Plaintiff’s common count is based
 19 on the same factual predicate as the conversion claim, Plaintiff’s common count of quantum meruit
 20 must fall with their conversion claim. (Mot. at 19.) *See also McBride v. Boughton*, 123 Cal. App.
 21

22 ¹¹ Plaintiffs misunderstand Google’s invocation of *In re Yahoo Mail Litigation*, 7 F. Supp. 3d 1016
 23 (N.D. Cal. 2014). Because Plaintiffs agreed to the data transfers, they necessarily agreed to the use
 24 of the network the device was then connected to—there could be no transfer otherwise. Plaintiffs
 25 argue that Google could have waited until the device was connected to WiFi. As an initial matter,
 26 for many users, that may be a long time or never at all. But regardless, this exposes Plaintiffs’
 27 argument for what it is: A new contract term that, far from conforming to the language of the
 28 agreement, would introduce new requirements found nowhere in the contractual language.

12 Plaintiffs seek judicial notice of various webpages describing Google Chrome Books and the
 2 Google Pixelbook. (See ECF Nos. 39-2, 39-1.) Plaintiffs appear to concede these pages do not
 3 constitute part of their agreements with Google, and instead argue these pages show that not every
 4 update termed “automatic” by Google will take place over a cellular network. (Opp. at 26.) Google
 5 has never contended otherwise, so these documents have no bearing here. Similarly, Plaintiffs seek
 6 judicial notice of Alphabet Inc.’s 10k filing, but this document also has no nexus with the claims at
 7 issue. The Court should decline to take judicial notice of these irrelevant materials.

1 4th 379, 394 (2004) (“A common count is not a specific cause of action, however; rather, it is a
 2 simplified form of pleading normally used to aver the existence of various forms of monetary
 3 indebtedness.”).

4 Even if quantum meruit were a standalone claim, Plaintiffs do not allege the necessary
 5 elements. To recover under quantum meruit, a plaintiff “must show the circumstances were such
 6 that the services were rendered under some understanding or expectation of both parties that
 7 compensation therefor was to be made.” *E.J. Franks Constr., Inc. v. Sahota*, 226 Cal. App. 4th
 8 1123, 1127 (2014). Here, Plaintiffs make no effort to allege that “both parties” (they and Google)
 9 shared an “understanding or expectation” that Plaintiffs would be compensated for data
 10 transmissions used to service their Android devices. (See Compl. ¶¶ 67-75.)

11 Further, Plaintiffs acknowledge that written agreements govern their use of Android
 12 devices. (See Compl. ¶ 45.) Because those contracts address data transfers between Google servers
 13 and Plaintiffs’ devices, any independent quantum meruit theory fails as a matter of law. *See, e.g.*,
 14 *Newbury Corp. v. Fireman’s Fund Ins. Co.*, 95 F.3d 1392, 1405 (9th Cir. 1996) (concluding party
 15 could not proceed on quantum meruit theory where “express contract existed . . . which covered
 16 the subject matter of th[e] suit”); *Hedging Concepts, Inc. v. First Alliance Mortgage Co.*, 41 Cal.
 17 App. 4th 1410, 1419 (1996) (similar).

18 **III. CONCLUSION**

19 For all these reasons, Plaintiffs’ Complaint should be dismissed in its entirety.

20

21 Dated: March 15, 2021

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